No. 47975-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of

Brian Taylor-Rose,

Appellant.

Clallam County Superior Court Cause No. 12-2-01143-8

The Honorable Judge Brian Coughenour

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

OTHER AUTHORITIES

ISSUES AND ASSIGNMENTS OF ERROR

1. Based on the court's instructions, the jury's verdict does not support commitment.
2. The jury did not find that Mr. Taylor-Rose qualifies as a sexually violent predator under the facts of this case.
3. The jury was not asked to determine if Mr. Taylor-Rose is likely to engage in predatory acts of sexual violence if released from detention under court-ordered supervision pursuant to his criminal sentence.

> **ISSUE 1:** Jurors are presumed to follow instructions, and jury verdicts "incorporate the instructions on which they are grounded, and reflect the facts required to be found as a basis for decision." Based on the court's instructions, does the jury's verdict fail to establish that Mr. Taylor-Rose is likely to engage in predatory acts of sexual violence if released under the court supervision ordered in connection with his 2009 criminal conviction?

4. The order committing Mr. Taylor-Rose violated his Fourteenth Amendment right to due process because it was not based on a finding that he is currently dangerous.
5. The court's instructions failed to make the relevant legal standard manifestly apparent to the average juror.
6. The trial court erred by giving instruction No. 15.
7. The trial court erred by including the word "unconditionally" in its "likely to engage" instruction.
8. The trial court's instructions allowed the jury to find that Mr. Taylor-Rose qualified for commitment even if he could be safely released on community supervision.
9. The trial court erred by refusing Mr. Taylor-Rose's proposed "likely to engage" instruction.
10. The trial court erred by refusing to instruct jurors that they could consider "placement conditions" in addition to voluntary treatment options.

11. The trial court erred by refusing to tell jurors that "Placement conditions that do exist in the community [include] the fact the state may file a new Petition charging Brian Taylor-Rose as a sexually violent predator if it learns he has committed a 'recent overt act.'"

    ISSUE 2: Due process requires that civil commitment be reserved for those who are mentally ill and currently dangerous. Does the commitment order violate due process because the court's instructions allowed jurors to conclude Mr. Taylor-Rose meets commitment criteria even absent proof of current dangerousness?

    ISSUE 3: At a civil commitment trial, jurors must decide if the person before them is likely to engage in predatory acts of sexual violence if not confined in a secure facility. Did the court's instructions fail to make the relevant standard manifestly clear to the average juror?

    ISSUE 4: At a civil commitment trial, the trial court must instruct jurors that they may consider "placement conditions" in determining the respondent's likelihood of engaging in predatory sexual violence when there is evidence that the respondent will be subject to court-ordered supervision even if released. Given the undisputed evidence that Mr. Taylor-Rose will be subject to 36-48 months of court-ordered community supervision upon release, did the trial judge err by refusing to instruct jurors that they could consider "placement conditions" in assessing the likelihood that he'll commit predatory acts of sexual violence?

    ISSUE 5: The state's ability to file a new petition based on a "recent overt act" following release is relevant to a sexually violent predator determination. Did the trial court err by refusing to instruct jurors that the state could file a new petition based on a "recent overt act" following release, rather than waiting for Mr. Taylor-Rose to commit a new sexually violent offense?

12. The commitment order violated Mr. Taylor-Rose's Fourteenth Amendment right to due process because the evidence was insufficient to prove that Mr. Taylor-Rose is currently dangerous.

13. The state erroneously relied on evidence of Mr. Taylor-Rose's lifetime risk of recidivism, rather than proving that he is currently dangerous.

> **ISSUE 6:** Due process prohibits civil commitment unless a person is currently dangerous. Did the state fail to prove current dangerousness because it relied exclusively on evidence of Mr. Taylor-Rose's lifetime risk of reoffense?

14. The trial judge improperly commented on the evidence in violation of Wash. Const. art. IV, §16.

15. Mr. Taylor-Rose's civil commitment infringed his right to due process because the court's instruction relieved the state of its burden to prove an element required for commitment.

16. The trial court improperly removed from the jury the determination of whether or not Mr. Taylor-Rose had previously been convicted of a "crime of sexual violence."

17. The trial court erred by instructing jurors that second-degree child molestation is *per se* a "crime of sexual violence."

18. The trial court erred by giving Instruction No. 6.

19. Instruction No. 6 failed to make the relevant standard manifestly clear to the average juror.

20. The trial court erred by giving Instruction No. 7.

21. Instruction No. 7 failed to make the relevant standard manifestly clear to the average juror.

> **ISSUE 7:** A judge may not comment on the evidence. Did the trial judge comment on the evidence and relieve the state of its burden of proof by telling jurors that Mr. Taylor-Rose's prior offense was *per se* a "crime of sexual violence" as a matter of law?

22. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

> **ISSUE 8:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Brian Taylor-Rose is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Brian Taylor-Rose was raised by Christian parents, who struggled to accept his sexual orientation. RP[1] 2355-2356. When he first told them he was gay, at 13, they took the position it was unacceptable and evil. RP 414, 2346, 2363. His stepfather beat him violently. RP 2355. He left home not long after this revelation. RP 414, 2354.

In 1997, Mr. Taylor-Rose was 18 years old. Ex. 1, Supp. CP. He admitted to police that he touched a 13-year-old boy, and pled guilty to child molestation in the second degree. RP 406; CP 53; Ex. 2, Supp. CP. As a gay man convicted of a sex offense, Mr. Taylor-Rose was very afraid of going to prison. RP 2056, 2098-2099. He attempted to get into a treatment program to avoid prison, but the court denied his request. RP 681-684, 748-754. During his 17 months at the Department of Corrections, he participated in sex offender treatment. RP 685.

After he got out, supervision was very challenging. RP 688-727, 764-768, 782-826, 996. His assigned community corrections officer decided that he was the scariest person she had ever supervised, and acted accordingly. RP 691, 861. At a couple of points, Mr. Taylor-Rose

[1] All of the verbatim report of proceedings is sequentially numbered except for the hearing on February 12, 2013. That hearing is not cited in this brief. All citations to transcripts will be RP.

ignored his supervision and moved out of the area. RP 712-717, 862-871. He married Gary Rose, who later died from complications from HIV. RP 1168, 2363, 2374, 2403.

In 2009, Mr. Taylor-Rose was arrested again. Ex. 18, Supp. CP. According to a boy named J.W., Mr. Taylor-Rose touched him once, over his clothing. RP 580-581, 930. Mr. Taylor-Rose pled guilty, this time to child molestation in the third degree. Ex. 19, Supp. CP. He entered an *Alford*[2] plea, and agreed to a sentence of 43 months. RP 66; Ex. 20, Supp. CP.

In 2012, the state filed a Petition to commit Mr. Taylor-Rose under RCW 71.09. CP 53-54. The matter went to a jury trial in Clallam County in 2015. Trial spanned 16 days, and the jury heard from multiple experts, alleged victims, and other witnesses during the trial.

The state's forensic psychologist, Dr. Harry Hoberman, testified that Mr. Taylor-Rose was likely to engage in predatory acts of sexual violence based on his lifetime risk. RP 1235, 1245, 1869, 1919-1921, 1920, 1972. He described risk assessment as determining the probability of a person "committing another sex offense, over their remaining lifetime…" RP 1235. He reiterated that he was "trying to develop an

[2] *N. Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (U.S. 1970).

opinion" as to the probability an individual would "commit a future predatory act of sexual violence, over their remaining lifetime." RP 1245.

He told the jury that he was "asked to rate Mr. Taylor-Rose, over the course of his lifetime." RP 1869. In a discussion with defense counsel, he repeated this point numerous times:

> [W]e're looking at Mr. Taylor-Rose's lifetime risk of sexual reoffending…
>
> I think what the statute requires… is that he has a current mental abnormality, and/or personality disorder, to make him more probable, than not, to commit future predatory sexual violent acts in his lifetime…
>
> I'm asked to give an opinion as to his lifetime… [W]hat I'm asked to give an opinion on, is his lifetime risk of committing future predatory acts of sexual violence…
>
> RP 1919-1921.

In response to a juror question about Mr. Taylor-Rose's low actuarial risk of recidivism he explained "I'm being asked to make an assessment of Mr. Taylor's lifetime risk, and so the rates that were lower, were for, either a five year period, or, in one case, a ten year period." RP 1970. He went on to describe how he made "adjustments, from five and ten year rates, to lifetime rates." RP 1972.

During closing arguments, the state reiterated this point:

> We're not talking about five years or ten years. We're talking about a lifetime.
>
> RP 2624.

If released from detention, Mr. Taylor-Rose plans to live with his parents. RP 2349. He will be subject to 36-48 months of court-ordered community supervision/community custody. Ex. 20, p. 4, Supp. CP. This term was imposed as part of his sentence for the 2009 offense. Ex. 20, p. 4, Supp. CP. Supervision will be provided by the Department of Corrections. Ex. 20, p. 4, Supp. CP.

Over objection, the court instructed jurors that

> "Likely to engage in predatory acts of sexual violence if not confined in a secured facility" means that the person more probably than not will engage in such acts if released unconditionally from detention in this proceeding…
>
> In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, you may consider all the evidence that bears on the issue. In considering voluntary treatment options, however, you may consider only voluntary treatment options that would exist of the respondent is unconditionally released from detention in this proceeding.
>
> CP 27.

Mr. Taylor-Rose objected to the inclusion of the word "unconditionally," since uncontested evidence showed he will be subject to conditions of community supervision/community custody upon release. Ex. 20, p. 4, Supp. CP; RP 2490-2502. He proposed a "likely to engage" instruction that did not include the word "unconditionally." Respondent's Proposed Jury Instructions filed 7/2/15, pp. 11-12, Supp. CP.

His proposed "likely to engage" instruction also told jurors they could consider "placement conditions or voluntary treatment options that would exist if the respondent is released from detention in this proceeding." Respondent's Proposed Jury Instructions filed 7/2/15, pp. 11-12, Supp. CP. In connection with this language, Mr. Taylor-Rose asked the judge to instruct jurors that "Placement conditions that do exist in the community is [sic] the fact that the state may file a new Petition charging Brian Taylor-Rose as a sexually violent predator if it learns he has committed a 'recent overt act.'" Respondent's Proposed Jury Instructions filed 7/2/15, p. 11, Supp. CP.[3]

The court refused to instruct on placement conditions and did not tell jurors that the state could file a new petition following release if Mr. Taylor-Rose committed a "recent overt act." CP 27.

The court instructed jurors that the state bore the burden of proving that "Brian Taylor-Rose has been convicted of a crime of sexual violence, *namely Child Molestation in the Second Degree*." CP 18 (emphasis added);[4] *see also* CP 19.

---

[3] He also asked the court to define "recent overt act," using the statutory language. Respondent's Proposed Jury Instructions filed 7/2/15, p. 11, Supp. CP; *see* RCW 71.09.020(12).

[4] Mr. Taylor-Rose proposed an elements instruction that omitted the italicized language. Respondent's Proposed Jury Instructions filed 7/2/15, p. 10, Supp. CP.

The jury found that Mr. Taylor-Rose met commitment criteria, and the court entered an order committing him indefinitely. CP 8, 9. Mr. Taylor-Rose timely appealed. CP 4.

ARGUMENT

I. THE JURY'S VERDICT DOES NOT SUPPORT COMMITMENT, BECAUSE JURORS WERE NOT ASKED IF MR. TAYLOR-ROSE WOULD BE LIKELY TO ENGAGE IN PREDATORY ACTS OF SEXUAL VIOLENCE IF RELEASED UNDER COURT-ORDERED SUPERVISION PURSUANT TO HIS CRIMINAL SENTENCE.

A jury is presumed to "follow the instructions provided to it." *State v. Mohamed*, --- Wn.2d ---, ___, 375 P.3d 1068 (2016). Because of this, jury verdicts "incorporate the instructions on which they are grounded, and reflect the facts required to be found as a basis for decision." *State v. Pharr*, 131 Wn.App. 119, 124, 126 P.3d 66 (2006), *disapproved of on other grounds by State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010).[5] Jury instructions must be read "the way a reasonable juror could have interpreted" them. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997) (citing

[5] *See also In re Pers. Restraint of Delgado*, 149 Wn.App. 223, 237, 204 P.3d 936 (2009). In *Delgado*, the Court of Appeals noted that the jury's special firearm verdicts "necessarily reflect[ed] the jury's finding that [the defendants] were armed with 'deadly weapons'" rather than operable firearms, because the trial court had instructed the jury to determine whether or not defendants were armed with deadly weapons. *Delgado*, 149 Wn.App. at 237.

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)).

In this case, the court asked jurors to determine whether Mr. Taylor-Rose was likely to engage in predatory acts of sexual violence "if released *unconditionally* from detention in this proceeding." CP 27 (emphasis added).[6] A reasonable juror "could have interpreted" this to require consideration of Mr. Taylor-Rose's risk level without taking into account the 36-48 months of court-ordered community supervision imposed following his 2009 criminal conviction.[7] *Miller*, 131 Wn.2d at 90; Ex. 20, p. 4, Supp. CP.

The jury is presumed to have followed this reasonable interpretation of the instruction. *Id.; Mohamed*, --- Wn.2d at ___. Therefore, the jury's verdict reflects only a finding that Mr. Taylor-Rose

---

[6] The word "unconditionally" was included over Mr. Taylor-Rose's objection. RP 2490-2502; Respondent's Proposed Jury Instructions filed 7/2/15, pp. 11-12, Supp. CP..

[7] This is especially true given the court's refusal to mention "placement conditions" in its "likely to engage" instruction, as outlined elsewhere in this brief. *Compare* CP 27 *with* Respondent's Proposed Jury Instructions filed 7/2/15, pp. 11-12, Supp. CP.; RCW 71.09.060(1); RCW 71.09.015; 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 365.14 (6th ed.). This omission directed jurors to consider "voluntary treatment options" rather than both "placement conditions" and "voluntary treatment options." CP 27; Respondent's Proposed Jury Instructions filed 7/2/15, pp. 11-12, Supp. CP. The Note On Use to WPI 365.14 indicates that the phrase "placement conditions" applies to Mr. Taylor-Rose's circumstances: "Use the bracketed phrase 'placement conditions' only if the evidence indicates that the respondent *will be subject to court-ordered supervision*, even if released on the predator petition." WPI 365.14 – Note On Use (emphasis added).

(Continued)

was likely to engage in predatory acts of sexual violence if unconditionally released. *See Pharr*, 131 Wn.App. at 124.

The verdict does not reflect a finding that Mr. Taylor-Rose qualified as a sexually violent predator if released on 36-48 months of court-ordered community supervision. *Id.* In other words, it does not reflect a finding under real-world conditions based on the undisputed evidence introduced at trial.[8]

The court phrased its instruction in the statutory language. *See* RCW 71.09.020(7). But "'[t]the standard for clarity in a jury instruction is higher than for a statute.'" *State v. Bland*, 128 Wn.App. 511, 515, 116 P.3d 428 (2005) (quoting *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996) *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010)). This is so because jurors cannot rely on the rules of interpretation familiar to lawyers and judges. *State v. Harris*, 122 Wn.App. 547, 553-554, 90 P.3d 1133 (2004) (*Harris* I).

A reasonable juror "could have interpreted" the instruction to preclude consideration of Mr. Taylor-Rose's community supervision when determining his likelihood of sexually violent recidivism. *Miller*, 131

[8] The legislature has made clear its desire to have juries decide civil commitment cases on the basis of real-world conditions. *See* RCW 71.09.015.

Wn.2d at 90. The verdict does not justify civil commitment of Mr. Taylor-Rose under the facts of this case. *Pharr*, 131 Wn.App. at 124. Because of this, the commitment order must be reversed and the case remanded for a new trial with proper instructions. *See In re Det. of Pouncy*, 168 Wn.2d 382, 392, 229 P.3d 678 (2010) (reversal of commitment order required where court fails to properly instruct jury).

II. THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE CURRENT DANGEROUSNESS, IN VIOLATION OF MR. TAYLOR-ROSE'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

One critical issue at Mr. Taylor-Rose's trial was his level of risk—whether he was "likely to engage in predatory acts of sexual violence" if released from detention. CP 18, 27. By statute, the "likely to engage" factor is an element required for commitment. CP 18; *see* RCW 71.09.020(7) and (18). This element also ensures that the statute complies with the due process, which requires proof of current dangerousness. U.S. Const. Amend. XIV; *In re Det. of Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009) (citing, *inter alia*, *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)).

Here, the trial court's flawed "likely to engage" instruction relieved the state of its burden to prove the element. This violated Mr. Taylor-Rose's constitutional right to due process because it allowed

commitment without proof that he is currently dangerous. U.S. Const. Amend. XIV; *Foucha*, 504 U.S. at 77.

A. This court should review the court's instructions *de novo* to ensure that they made the relevant standard manifestly apparent to the average juror.

Courts review *de novo* constitutional errors, jury instructions, and issues of statutory interpretation. *State v. Boyle*, 183 Wn.App. 1, 6, 10, 335 P.3d 954 (2014), *review denied,* 184 Wn.2d 1002, 357 P.3d 666 (2015). In criminal cases, instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Because civil commitment involves a "massive"[9] deprivation of liberty, the "manifestly apparent" standard should apply here as well. Procedural and substantive due process require application of the "manifestly apparent" standard in civil commitment cases. *See Matter of Det. of M.W. v. Dep't of Soc. & Health Servs.*, 185 Wn.2d 633, 654, 374 P.3d 1123 (2016) (analyzing substantive and procedural due process challenges to RCW 71.05.320(3)(c)(ii); *State v. McCuistion*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012) (analyzing substantive and procedural due process challenges to RCW 71.09.090(4)).

[9] *See, e.g., In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) ("massive" deprivation of liberty requires narrow construction of statute).

Procedural due process. Courts resolve procedural due process claims by balancing the individual interest at stake, the risk of error posed by the available procedures, and the state's interest in a particular procedure. *M.W.*, 185 Wn.2d at 653-54 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Because civil commitment involves a massive curtailment of liberty, the first factor weighs in favor of more rigorous procedural protections. *Id.*, at 654.

The second factor supports the "manifestly apparent" standard as well. Instructions may be clear "to the trained legal mind" without adequately communicating an important legal standard to the average juror. *State v. Fischer*, 23 Wn.App. 756, 759, 598 P.2d 742 (1979) (cited with approval by *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)). Any miscommunication regarding the correct legal standard has the potential to result in an erroneous finding. This potential for error supports the "manifestly apparent" standard in the criminal context. *Id.*; *see Kyllo*, 166 Wn.2d at 864; *see also State v. Borsheim*, 140 Wn.App. 357, 366, 165 P.3d 417 (2007). No lesser standard should apply in the civil commitment context, where the massive curtailment of liberty is based on predictions of the future rather than on past criminal conduct.

Finally, the third factor also weighs heavily in favor of applying the *Kyllo* standard here. The state has a "'compelling interest both in

treating sex predators and protecting society from their actions.'" *In re Det. of Morgan*, 180 Wn.2d 312, 322, 330 P.3d 774 (2014) (quoting *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993)). This interest is furthered by jury instructions that are manifestly clear. Jurors who misinterpret their instructions may well release a predator who should be confined.[10] There are no additional costs associated with ensuring that jury instructions are manifestly clear.

Under *Mathews,* procedural due process requires application of the "manifestly apparent" standard for jury instructions in civil commitment cases. All three *Mathews* factors favor application of this standard.

Substantive due process. Civil commitment is constitutional if it is narrowly drawn to serve compelling state interests. *McCuistion*, 174 Wn.2d at 387. Our civil commitment statute is constitutional because it requires proof that the detainee is "mentally ill and currently dangerous." *Moore*, 167 Wn.2d at 124 (citing, *inter alia*, *Foucha, supra*). Where jury instructions are not manifestly clear, jurors might erroneously find that a detainee qualifies for civil commitment, even in the absence of sufficient evidence. *Cf. Sandstrom,* 442 U.S. at 514 (due process violated where

[10] Furthermore, they are just as likely to commit someone who should be released, resulting in unnecessary costs relating to detention and treatment of someone who should be at liberty.

reasonable juror "could have interpreted" instruction as mandatory presumption relieving state of its burden to prove intent).

Civil commitment violates substantive due process if the jury misreads the court's instructions to allow commitment of someone who is not mentally ill and currently dangerous. *Id.; Foucha*, 504 U.S. at 77. A procedure allowing erroneous detention is not narrowly tailored to the state's compelling interest in confining those who are mentally ill and currently dangerous. The "manifestly apparent" standard should apply in civil commitment cases to ensure that the statute is implemented in a manner that complies with substantive due process. *Foucha*, 504 U.S. at 77; *McCuistion*, 174 Wn.2d at 387.

B. The instruction requiring jurors to determine Mr. Taylor-Rose's risk level if "released unconditionally from detention" was not supported by the evidence and failed to make the relevant standard manifestly apparent to the average juror.

If released, Mr. Taylor-Rose will be required to serve 36-48 months of court-ordered community supervision. Ex. 20, p. 4, Supp. CP. The court's instructions did not allow jurors to consider this fact when evaluating his current dangerousness. CP 27.

Over objection,[11] the trial court instructed jurors to determine whether or not Mr. Taylor-Rose "more probably than not will engage in [predatory acts of sexual violence] if released *unconditionally* from detention in this proceeding." CP 27 (emphasis added). The undisputed evidence at trial showed that he will *not* be released unconditionally. Ex. 20, p. 4, Supp. CP. Upon release, Mr. Taylor Rose will be subject to court-ordered supervision for 36-48 months, resulting from his 2009 criminal conviction. Ex. 20, p. 4, Supp. CP.

The court's inclusion of the word "unconditionally" in Instruction No. 15 relieved the state of its burden to prove beyond a reasonable doubt an element required for civil commitment. CP 27. This violated Mr. Taylor-Rose's constitutional right to due process, because it allowed commitment even in the absence of proof that he is currently dangerous. *See Foucha*, 504 U.S. at 77; *Moore*, 167 Wn.2d at 124.

Jury instructions are read "the way a reasonable juror could have interpreted" them. *Miller*, 131 Wn.2d at 90. To be sufficient, instructions must be "supported by the evidence." *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015).

[11] RP 2490-2502; *see* Respondent's Proposed Jury Instructions filed 7/2/15, pp. 11-12, Supp. CP.

The "facts of a particular case" govern the propriety of a jury instruction. *Id.* The "facts of [this] particular case" include the 36-48 months of community supervision imposed following Mr. Taylor-Rose's 2009 criminal conviction. *Id.;* Ex. 20, p. 4, Supp. CP.

The instruction requiring jurors to consider Mr. Taylor-Rose's risk "if released unconditionally" was not supported by the evidence: there was no chance that he would be released "unconditionally." CP 27. The word "unconditionally" should have been omitted from the instruction, as the defense requested. Respondent's Proposed Jury Instructions filed 7/2/15, pp. 11-12, Supp. CP. The "likely to engage" instruction was inconsistent with undisputed evidence that Mr. Taylor-Rose would serve 36-48 months of community custody upon release. Ex. 20, p. 4, Supp. CP.

The average juror would not know how to resolve this inconsistency. A reasonable juror "could have interpreted" the court's inclusion of the word "unconditionally" to prohibit consideration of the court-ordered supervision attending Mr. Taylor-Rose's 2009 criminal conviction. *Miller*, 131 Wn.2d at 90; CP 27; Ex. 20, p. 4, Supp. CP. Under such an interpretation, Mr. Taylor-Rose would be subject to

commitment even if he could live safely in the community while under court-ordered supervision stemming from his 2009 criminal conviction.[12]

The court's "likely to engage" instruction was not supported by the evidence and did not make the relevant legal standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864. A reasonable juror could have interprteted the instruction to relieve the state of its burden to prove that Mr. Taylor-Rose is currently dangerous under the real-world conditions that will exist upon his release. This violated his constitutional right to due process. *Foucha*, 504 U.S. at 77; *Moore*, 167 Wn.2d at 124. The commitment order must be reversed and the case remanded for a new trial with proper instructions. *See Pouncy*, 168 Wn.2d at 392.

C. The trial court infringed Mr. Taylor-Rose's due process right to a fair trial by refusing to instruct jurors to consider Mr. Taylor-Rose's "placement conditions" upon release.

In keeping with WPI 365.14, Mr. Taylor-Rose asked the court to instruct jurors to consider "placement conditions or voluntary treatment options that would exist if [he were] released from detention in this proceeding." Respondent's Proposed Jury Instructions filed 7/2/15, pp.

[12] The legislature has specifically authorized proof of "conditions that would exist… in the absence of a finding that the person is a sexually violent predator." RCW 71.09.015. Such conditions are "typically pre-existing community supervision conditions placed on respondent in connection with a prior criminal conviction." Comment to WPI 365.14.

11-12, Supp. CP; WPI 365.14. The court refused, and omitted the phrase "placement conditions" from its "likely to engage instruction." CP 27.

The phrase "placement conditions" applies when a "respondent will be subject to court-ordered supervision, even if released on the predator petition." WPI 365.14 – Note On Use. This is in keeping with two statutory provisions. First, "[i]n determining whether or not [a] person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only *placement conditions* and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition." RCW 71.09.060(1) (emphasis added). Second, juries are to be "presented only with *conditions* that would exist or that the court would have the authority to order in the absence of a finding that the person is a sexually violent predator." RCW 71.09.015 (emphasis added).

Upon release, Mr. Taylor-Rose will be subject to subject to court-ordered community supervision of 36-48 months. Ex. 20, p. 4, Supp. CP. This is a "placement condition" under RCW 71.09.060(1). *See* WPI 365.14 – Note On Use. Although jurors were told to consider "all the evidence that bears on the issue," the court singled out "voluntary treatment options that would exist if the respondent is unconditionally

released." CP 27. The court did not tell jurors they could also consider the conditions under which Mr. Taylor-Rose would be released. CP 27.

Under the court's instructions, a reasonable juror would not have known to consider "placement conditions… that would exist if the respondent is unconditionally released." Respondent's Proposed Jury Instructions filed 7/2/15, pp. 11-12, Supp. CP.; WPI 365.14. This is especially true given the court's inclusion of the word "unconditionally," which appears twice in the instruction. CP 27. As noted above, a reasonable juror could interpret the instruction to preclude consideration of an existing placement condition—that he would be subject to court-ordered supervision for 36-48 months following release.

The court's "likely to engage" instruction did not make the relevant legal standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864. By omitting any language about Mr. Taylor-Rose's actual placement conditions, the court relieved the state of its burden to prove current dangerousness. This violated due process and requires reversal of the commitment order. *Foucha*, 504 U.S. at 77.

D. The trial court relieved the state of its burden to prove current dangerousness by refusing to instruct jurors that the state could

> base a new petition following release on a "recent overt act" that did not amount to a new sexually violent offense.

At a civil commitment trial, jurors must determine if the detainee is likely to engage in predatory acts of sexual violence. RCW 71.09.060(1). The jury may consider "placement conditions… that would exist for the person if unconditionally released." RCW 71.09.060(1).

The fact that a respondent who is released "could be subject to another SVP proceeding if he commits a recent overt act is relevant" to this determination, because the availability of a new petition "is a condition that would exist upon placement in the community." *In re Det. of Post*, 170 Wn.2d 302, 316–17, 241 P.3d 1234 (2010) (citing RCW 71.09.020(12) and RCW 71.09.030(1)(e)).

Post controls here.

In this case, the trial judge refused to instruct jurors that "the state may file a new Petition charging Brian Taylor-Rose as a sexually violent predator if it learns he has committed a 'recent overt act.'" Respondent's Proposed Jury Instructions filed 7/2/15, p. 11, Supp. CP.[13] But as the *Post* court noted, "knowledge of the consequences for engaging in [a recent overt act] may well serve as a deterrent to such conduct and, therefore, has some tendency to diminish the likelihood of [the respondent] committing

[13] The proposed instruction also defined "recent overt act" in accordance with RCW 71.09.020(12). Respondent's Proposed Jury Instructions filed 7/2/15, p. 11, Supp. CP.

another predatory act of sexual violence." *Id.* It is therefore "relevant to the determination of whether [a detainee] is an SVP." *Id.* It is also "a condition to which [the detainee] would be subject if released," and thus is not barred by the legislature's insistence that the jury evaluate real world conditions. *Id.*, at 317 (citing RCW 71.09.060(1); *see also* RCW 71.09.015.

The availability of an recent overt act petition serves another important function as well. Juries are understandably reluctant to release detainees who are potentially dangerous, even if they do not qualify for commitment. Jurors should be informed that a new petition can be filed following release even absent a new criminal offense. Allowing jurors to know this would ameliorate their reluctance to release a potentially dangerous person.

Although *Post* addressed the admissibility of evidence, its reasoning applies here. The availability of a recent overt act petition increased the deterrent pressure Mr. Taylor-Rose was subject to, and would have relieved juror anxiety about releasing a person with his criminal record. His attempt to tell jurors of this possibility through an instruction does not distinguish his case from *Post*, so long as the instruction was proper.

Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Wiebe*, --- Wn.App. ---, ___, 377 P.3d 290 (2016). Jury instructions are improper if they do not permit a party to argue his theories of the case. *State v. Erhardt*, 167 Wn.App. 934, 939, 276 P.3d 332 (2012).

As a matter of law, Mr. Taylor-Rose would be subject to a new petition based on a recent overt act committed after release. RCW 71.09.020(7) and (12); RCW 71.09.030(1)(e); RCW 71.09.060(1). The proffered instruction was a correct statement of the law. It was not misleading, and it would have allowed Mr. Taylor-Rose to argue his theory of the case. *Id.* Without it, he was unable to explain to jurors that even a noncriminal act could subject him to future commitment.

The court's failure to give Mr. Taylor-Rose's proposed instruction relieved the state of its burden to prove that he is currently dangerous. Without the instruction, jurors were unable to make an accurate assessment of his dangerousness, and thus could not determine whether or not he was "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(7)

The court should have given the instruction. *Id.* Mr. Taylor-Rose's commitment order must be reversed and the case remanded for a new trial.

Upon retrial, the court must instruct jurors regarding the "conditions" to which Mr. Taylor-Rose will be subject upon release, including the possibility that the state would file a new petition based on a "recent overt act" that fell short of a new criminal offense. *Id.*; *Post*, 170 Wn.2d a 316–17.

III. THE EVIDENCE WAS INSUFFICIENT FOR COMMITMENT BECAUSE THE STATE RELIED ON LIFETIME RISK INSTEAD OF PROVING THAT MR. TAYLOR-ROSE IS CURRENTLY DANGEROUS.

At trial, the state's evidence focused on Mr. Taylor-Rose's lifetime risk. Dr. Hoberman repeatedly told the jury that his task was to determine Respondent's lifetime risk. RP 1235, 1244, 1869, 1919-1921, 1970-1972. No witness examined the risk over a shorter period. In closing, the state relied on lifetime risk. RP 2624. The court did not instruct jurors to consider risk over a shorter time period. CP 10-30.

The evidence was insufficient for commitment. The state failed to prove that Mr. Taylor-Rose is currently dangerous.[14] His commitment violates due process because it is based on his lifetime risk of recidivism rather than on his current dangerousness.

[14] Mr. Taylor-Rose is 38 years old; thus (according to the Social Security Administration) he can be expected to live an additional 44 years. Social Security Administration, Life Expectancy Calculator, available at https://www.ssa.gov/cgi-bin/longevity.cgi (last accessed September 28, 2016).

A. RCW 71.09 does not permit commitment based on lifetime risk, because it only allows commitment of those who are currently dangerous.

Due process prohibits civil commitment for those who are not currently dangerous. *Foucha* 504 U.S. at 78. The word "currently" is an adverb meaning "at the present time; now." *Dictionary.com Unabridged,* Random House, Inc. (2016).[15]

A person who is "currently dangerous" is dangerous at the present time. *Dictionary.com.* Someone who is unlikely to reoffend unless risk is aggregated over a long period cannot be described as "currently" dangerous: he is not dangerous at the present time.

Where possible, statutes must be construed to avoid constitutional difficulty. *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015). If interpreted to allow commitment of those who are not currently dangerous, RCW 71.09 would be unconstitutional under *Foucha.*

Because of this, RCW 71.09 may not be construed to allow commitment based on lifetime risk.[16] *Utter*, at 434. A person who is not

[15] Available at http://www.dictionary.com/browse/currently (last accessed: September 27, 2016).

[16] The sole exception would be the rare case where the state seeks commitment of a person nearing the end of his life.

(Continued)

currently dangerous but who might reoffend over the course of his lifetime does not qualify for commitment under *Foucha*.[17]

This is consistent with the rule requiring courts to strictly construe statutes involving a deprivation of liberty. *Hawkins*, 169 Wn.2d at 801. When strictly construed in favor of liberty, the statute does not allow commitment based on lifetime risk.

Substantive due process also requires this interpretation. The provisions of RCW 71.09 are constitutional only to the extent they are narrowly tailored to achieve the government's interest in protecting the public and providing treatment. *Young*, 122 Wn.2d at 26; *In re Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

Allowing commitment based on lifetime risk would violate substantive due process. Commitment based on lifetime risk is not narrowly tailored to achieving the government's goals of protecting the public from and providing treatment to those who are currently dangerous. A lesser period would still allow the state to confine and treat those most likely to commit predatory acts of sexual violence. At the same time, such a standard would exclude those whose recidivism risk is low, unless considered over the course of an entire lifespan.

---

[17] In some cases, a person's low life expectancy may permit commitment based on lifetime risk.

Instead of lifetime risk, some other formulation must be used to express a person's overall risk. The state need not prove imminent risk. *In re Harris*, 98 Wn.2d 276, 281-282, 654 P.2d 109 (1982) (*Harris* II) (addressing RCW 71.05). Nor is the state required to prove that the risk arises within the foreseeable future, or within a fixed number of years. *Moore*, 167 Wn.2d at 123; *In re Det. of Keeney*, 141 Wn.App. 318, 327, 169 P.3d 852 (2007). But this does not eliminate the possibility of other formulations of the appropriate standard.

For example, the state may be required to prove that a detainee is likely to engage in predatory acts of sexual violence within "a reasonable period of time." *See, e.g.*, RCW 10.77.86 (in cases of incompetency, requiring a judge or jury to determine if "there is a substantial probability that the defendant will regain competency *within a reasonable period of time*") (emphasis added). Similarly, the state may be required to prove a detainee likely to engage in such acts "within a period of time short enough to conclude that the detainee is currently dangerous." Indeed, the factfinder might be specifically and explicitly tasked with finding that the detainee is "currently dangerous;" this would ensure compliance with *Foucha*.

What is prohibited is commitment based on lifetime risk. Such a commitment does not rest on a finding of current dangerousness, and thus

violates due process. *Foucha*, 504 U.S. at 77. Here, the jury's verdict rested on evidence of lifetime risk. This violated Mr. Taylor-Rose's Fourteenth Amendment right to due process. *Id.*

B. The state failed to prove that Mr. Taylor-Rose is currently dangerous, given the state's reliance on his lifetime risk of recidivism.

Here, Mr. Taylor-Rose argued that due process prohibited commitment based on lifetime risk.[18] RP 119-123; Respondent's Trial Brief and Motions In Limine filed 7/2/15, pp. 10-14, Supp. CP. He sought to exclude evidence of his lifetime risk. RP 119-123; Respondent's Trial Brief and Motions In Limine filed 7/2/15, pp. 10-14, Supp. CP. The trial court denied his motion. CP 46.

Dr. Hoberman framed his conclusions in terms of Mr. Taylor-Rose's lifetime risk. RP 1235, 1244, 1869, 1919-1921, 1970-1972. The prosecutor relied on lifetime risk in closing argument. RP 2624. The jury was not instructed to consider Mr. Taylor-Rose's risk over a period shorter than his lifetime. CP 10-30.

[18] Respondent's attorney argued for consideration of risk within the foreseeable future or within a term of years. Respondent's Trial Brief and Motions In Limine filed 7/2/15, pp. 10-14, Supp. CP.

(Continued)

The evidence here is insufficient for commitment.[19] The state relied on Mr. Taylor-Rose's lifetime risk of recidivism, and failed to prove that he is currently dangerous.

Due process does not permit commitment on the basis of lifetime risk; instead, the state must prove that the detainee is *currently* dangerous. *Foucha*, 504 U.S. at 77. Accordingly, even when taken in a light most favorable to the government, the evidence was insufficient to support Mr. Taylor-Smith's commitment. The commitment order must be reversed and the petition dismissed with prejudice. *Id.*

IV. THE TRIAL COURT VIOLATED MR. TAYLOR-ROSE'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY COMMENTING ON THE EVIDENCE AND RELIEVING THE STATE OF ITS BURDEN TO PROVE A PRIOR CONVICTION FOR A "CRIME OF SEXUAL VIOLENCE."

Mr. Taylor-Rose could only be committed if the jury found that he'd previously been convicted of a "crime of sexual violence." RCW 71.09.020(18); RCW 71.09.060(1); *see also* CP 17-18. The court did not properly define that term for the jury. Instead, the court's instructions

[19] The error here was preserved by trial counsels' argument and motion in limine. RP 119-123; Respondent's Trial Brief and Motions In Limine filed 7/2/15, pp. 10-14, Supp. CP. In addition, the sufficiency of the evidence may always be raised for the first time on appeal as a manifest error affecting a constitutional right and as a failure to prove facts upon which relief can be granted. *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 892 (2006); RAP 2.5(a)(2) and (3). Evidence is insufficient to support civil commitment unless – taken in the light most favorable to the state – it is adequate to persuade a fair-minded, rational person that the state has proved the elements beyond a reasonable doubt. *In re Det. of Aston*, 161 Wn.App. 824, 830, 251 P.3d 917 (2011).

commented on the evidence and relieved the state of its burden to prove that he'd been convicted of a "crime of sexual violence," in violation of Mr. Taylor-Rose's Fourteenth Amendment right to due process.

A. RCW 71.09 differentiates between "sexually violent offenses" and "crimes of sexual violence."

Involuntary civil commitment involves a "massive curtailment of liberty." *In re Detention of Anderson*, 166 Wn.2d 543, 556, 211 P.3d 994 (2009) (citations and internal quotation marks omitted). Because of this, a civil commitment statute such as RCW 71.09 must be strictly construed to its terms. *In re Detention of Martin*, 163 Wn.2d 501, 509, 182 P.3d 951 (2008).

A court construing RCW 71.09 must choose a "narrow, restrictive construction" over a "broad, more liberal interpretation." *Id.* at 510. Civil incarceration achieved by means other than strict compliance with RCW 71.09 deprives a person of liberty without due process. *Id.* at 511; U.S. Const. Amend. XIV.

Where the legislature uses different language in the same statute, different meanings are intended.[20] *State v. Costich*, 152 Wn.2d 463, 475-476, 98 P.3d 795 (2004). Principles of statutory interpretation require a

[20] Statutory construction is a question of law reviewed *de novo*. *Strand*, 167 Wn.2d at 186. The primary objective of statutory construction is to ascertain and carry out the intent of the legislature. *Id.* at 188.

"comprehensive reading" of RCW 71.09, deriving legislative intent from "ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *In re Det. of Strand*, 167 Wn.2d 180, 188, 217 P.3d 1159 (2009) (internal quotation marks and citations omitted).

A person's prior offenses play a significant role in commitment proceedings under RCW 71.09. The statute uses two different phrases to describe a predicate offense under RCW 71.09: "sexually violent offense" and "crime of sexual violence." *See* RCW 71.09.020(17) *and* RCW 71.09.020(18). Since the legislature used different language, it necessarily intended different meanings. *Costich,* 152 Wn.2d at 475-476.

The phrase "sexually violent offense" is used repeatedly throughout the statute; however, the phrase "crime of sexual violence" occurs only once: in the definition of sexually violent predator. RCW 71.09.020(18); *see also* RCW 71.09.020(17), RCW 71.09.025; RCW 71.09.030; RCW 71.09.060; RCW 71.09.140.

"Sexually violent offense" has a specific and concrete meaning assigned by the legislature. RCW 71.09.020(17). It is defined with reference to a limited list of qualifying offenses. RCW 71.09.020(17).[21] A

[21] Under the statutory definition,

(Continued)

person who has been convicted of a "sexually violent offense"[22] and who appears to meet criteria for commitment will be referred to the Office of the Attorney General and relevant prosecuting attorney(s) three months prior to release. RCW 71.09.025(1)(a). These officials may file a petition for civil commitment when it appears that such a person—one who has been convicted of a "sexually violent offense"—is about to be released from total confinement or has previously been released and has since committed a recent overt act. RCW 71.09.030(1). Jurisdiction for filing such a petition is based on where the "sexually violent offense" (or subsequent overt act) occurred. RCW 71.09.030(2). Notice must be provided to certain people upon the discharge (or escape) of a person who has committed a "sexually violent offense." RCW 71.09.140.[23]

> "Sexually violent offense" means … rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; [an equivalent offense under a prior statute, federal law, or from another jurisdiction]; an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act [was done with sexual motivation]; or… an attempt, criminal solicitation, or criminal conspiracy to commit [one of the listed offenses]." RCW 71.09.020(17).

[22] Or who has been found incompetent to stand trial for such an offense, or who has been found not guilty by reason of insanity for such an offense. RCW 71.09.025.

[23] RCW 71.09.060's two references to "sexually violent offenses" impose additional requirements where the offense was a crime that was sexually motivated or where the person charged with a sexually violent offense has been found incompetent.

In contrast to the phrase "sexually violent offense," the statute does not define the phrase "crime of sexual violence." *See* RCW 71.09.020. This phrase appears only in the definition of sexually violent predator. RCW 71.09.020(17). The trier of fact in a civil commitment trial must determine whether a person qualifies as a sexually violent predator, which requires it to determine if the detainee has been convicted of a "crime of sexual violence." RCW 71.09.020(18); RCW 71.09.060(1). This is one element of the criteria for commitment. RCW 71.09.020(18); RCW 71.09.060(1).

Where a statute fails to define a term, rules of statutory construction require that the term be given its plain and ordinary meaning, derived from a standard dictionary if possible. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 225, 137 P.3d 844 (2006).

Applying this rule and the requirement that RCW 71.09 be strictly construed, the phrase "crime of sexual violence" must be given the most restrictive definition derived from the ordinary meaning of each word. Assuming a detainee's predicate offenses qualify as sexual crimes, only the meaning of the word "violence" must be examined. The dictionary definitions of violence include "swift and intense force," or "rough or

injurious physical force." *Dictionary.com*.[24] In other words, a "crime of sexual violence" is a sex offense accomplished through the application of "swift and intense force" or "rough and injurious physical force."

If a person is to be civilly committed, he (or she) must have a prior conviction (or finding of incompetence or insanity) that meets two separate tests. First, the conviction must be for one of the enumerated offenses in RCW 71.09.020(17) (defining "sexually violent offense). Such an offense will trigger a 3-month notice to the prosecuting agency (and the attorney general's office), establish the proper jurisdiction for a civil commitment petition, and allow the appropriate agency to file a petition. RCW 71.09.025(1)(a); RCW 71.09.030.

Second, the trier of fact must find that the offense was a "crime of sexual violence." Such a finding must be based on evidence that the crime was accomplished through "swift and intense force" or "rough and injurious physical force." RCW 71.09.020(18); *Dictionary.com*.

The reason for the two separate definitions is apparent when the phrases are examined in context, as required by *Strand*. *Strand*, 167 Wn.2d at 188. Questions involving screening, jurisdiction, and notice rest on the defined list of crimes that qualify as "sexually violent offenses." No

[24] Available at http://www.dictionary.com/browse/violence (last accessed: September 27, 2016).

factfinding is required to perform these functions. Instead, decisions can be made simply by referring to the list of offenses. RCW 71.09.020(17).

By contrast, indefinite civil commitment following trial requires a factual determination that the predicate offense qualifies as a "crime of sexual violence." RCW 71.09.020(18); RCW 71.09.060(1). The fact-finder must decide whether the predicate offense was in fact accomplished by "swift and intense force," or "rough or injurious physical force." RCW 71.09.020(18); *Dictionary.com.* When the state seeks to confine someone indefinitely, the jury may not rely on a list of offenses, but must examine the underlying facts and determine whether the offense involved actual violence.[25]

This reading is consistent with the statute's purpose: to address the risks posed by the "small but extremely dangerous group of sexually violent predators"—those who are likely to engage in "repeat acts of predatory sexual violence"—and not the larger pool of sexual predators who are not violent. *See* RCW 71.09.010.

In this case, the state alleged that Mr. Taylor-Rose had been convicted of second-degree child molestation, "a sexually violent offense,

[25] Some sexually violent offenses—such as those involving forcible compulsion—will by definition involve actual violence. Others, however—such as Child Molestation or Residential Burglary with Sexual Motivation—might be accomplished without actual violence.

as that term is defined in RCW 71.09.020(17)." CP 53. The question for the jury was whether or not Mr. Taylor-Rose was a sexually violent predator, which required proof that his prior offense qualified as a "crime of sexual violence." RCW 71.09.020(18). This, in turn, required jurors to determine if this offense was violent "in fact"— that is, accomplished by physical force that was rough, injurious, swift, and/or intense. RCW 71.09.020(18); *Dictionary.com.*

B. The court's instructions included a comment on the evidence, relieving the state of its burden to prove that Mr. Taylor-Rose had been convicted of a "crime of sexual violence" and directing a verdict in favor of the state.

In its elements instruction, the court instructed jurors that the state was required to prove that Mr. Taylor-Rose "has been convicted of a crime of sexual violence, *namely Child Molestation in the Second Degree.*" CP 18 (emphasis added); *see also* CP 19. This contrasted with the instruction proposed by Mr. Taylor-Rose, which required proof that he'd been "convicted of a crime of sexual violence" but did not tell jurors that his prior offense automatically qualified as such a crime. Respondent's Proposed Jury Instructions filed 7/2/15, p. 10, Supp. CP.

As given, the court's instruction amounted to an unconstitutional judicial comment on the evidence. It erroneously told jurors that the state's obligation to prove a "crime of sexual violence" had been met as a

matter of law, instead of requiring them to determine if Mr. Taylor-Rose's 1997 offense was accomplished by violence "in fact."

Under the state constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. IV, §16. A court may not "instruct the jury that matters of fact have been established as a matter of law." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). An improper judicial comment can always be raised for the first time on review as a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Fehr*, 185 Wn.App. 505, 511, 341 P.3d 363 (2015).

Here, the instructions did not define the phrase "crime of sexual violence" for the jury. Instead, the court's instructions allowed the jury to return a "yes" verdict if it found that Mr. Taylor-Rose had been "convicted of a crime of sexual violence, namely Child Molestation in the Second Degree." CP 18; *see also* CP 19. This was an unconstitutional comment on the evidence. *Becker*, 132 Wn.2d at 64; *see also State v. Brush*, 183 Wn.2d 550, 556-560, 353 P.3d 213 (2015).

To commit Mr. Taylor-Rose, the jury was required to find that his prior offense qualified as a "crime of sexual violence." RCW 71.09.020(18). This required a factual determination regarding the

physical force used to accomplish the prior offenses. RCW 71.09.020(18); *Dictionary.com*.

Under Instruction No. 6, the jury was directed to return a "yes" verdict based on the prior conviction for second-degree child molestation, regardless of whether or not the offense involved actual violence. The instruction was "tantamount to a directed verdict." *Becker*, 132 Wn.2d at 65.

A comment of this sort is presumed to be prejudicial and reversal is required unless the record affirmatively establishes that no prejudice could have resulted. *Brush*, 183 Wn.2d at 559. This is a higher standard than that required for ordinary constitutional error.

In Mr. Taylor-Rose's case, there was no evidence that he used "swift and intense force," or "rough or injurious physical force" in committing his prior offense. Instead the evidence showed that he touched a sleeping 13-year-old. RP 406; CP 53. The record does not affirmatively establish beyond a reasonable doubt that no prejudice could have resulted from the improper judicial comment. *Id.*

The instruction was tantamount to a directed verdict. It relieved the state of its burden to prove the elements required for commitment, and violated Mr. Taylor-Rose's Fourteenth Amendment right to due process. *Martin,* 163 Wn.2d at 509. Accordingly, the commitment order must be

vacated and the case remanded for a new trial with proper instructions. *See Brush*, 183 Wn.2d at 561.

C. The errors in Instructions Nos. 6 and 7 are preserved for review.

Mr. Taylor-Rose proposed an elements instruction that did not include the improper judicial comment. Respondent's Proposed Jury Instructions filed 7/2/15, p. 10, Supp. CP. His proposed instruction directed jurors to determine whether or not he had "been convicted of a crime of sexual violence." Respondent's Proposed Jury Instructions filed 7/2/15, p. 10, Supp. CP.

Unlike the court's instruction, Mr. Taylor-Rose's instruction did not tell jurors that second-degree child molestation automatically qualified as a crime of sexual violence. *Cf.* Instruction Nos. 6 and 7, CP 18-19. By proposing this instruction, Mr. Taylor-Rose preserved the judicial comment and the due process error for review. *See State v. Shumaker*, 142 Wn.App. 330, 333, 174 P.3d 1214 (2007), *as amended on denial of reconsideration* (Feb. 26, 2008).

In addition, a judicial comment may always be raised for the first time on appeal. *State v. Besabe*, 166 Wn.App. 872, 880, 271 P.3d 387 (2012). The same is true of any manifest error affecting a constitutional right. RAP 2.5(a)(3). To raise a manifest error, an appellant need only make "a plausible showing that the error... had practical and identifiable

consequences in the trial." *State v. Lamar,* 180 Wn.2d 576, 583, 327 P.3d 46 (2014).[26] An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *O'Hara,* 167 Wn.2d at 100.

If Mr. Taylor-Rose's proposed instruction does not preserve the error for review, he may nonetheless raise the issue as a manifest error affecting his constitutional right to a trial free of improper judicial comment (under art. IV, §16) and his right to due process (under the Fourteenth Amendment.)

D. This court should decline to follow Division I's decision in *Coppin,* which ignored established Supreme Court precedent.

Division I previously found the phrase "crime of sexual violence" to mean the same thing as the phrase "sexually violent offense." *In re Det. of Coppin*, 157 Wn.App. 537, 553, 238 P.3d 1192 (2010).

This court should not follow *Coppin.*

The *Coppin* court ignored well-settled rules of statutory interpretation: "[i]t is firmly established… that where the legislature uses different language in the same statute, differing meanings are intended." *Costich*, 152 Wn.2d at 475–76. This is a "basic rule" of statutory

[26] The showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Id.*

construction. *Durland v. San Juan Cty.*, 182 Wn.2d 55, 79, 340 P.3d 191 (2014) (internal quotation marks and citation omitted).

In addition, the *Coppin* court ignored constitutional principles applicable to RCW 71.09. Because it involves a deprivation of liberty, the statute must be strictly construed against the state. *Martin*, 163 Wn.2d at 508; *see also In re Det. of Fair*, 167 Wn.2d 357, 376, 219 P.3d 89 (2009); *Hawkins*, 169 Wn.2d at 801.

For all these reasons, the phrase "crime of sexual violence" cannot mean the same thing as the phrase "sexually violent offense." A "sexually violent offense" is one enumerated by the statute. RCW 71.09.020(17). A "crime of sexual violence" is a sexual offense accomplished by "swift and intense force" or by "rough or injurious physical force." *Dictionary.com.* The state may petition for civil commitment based on an offense that qualifies under RCW 71.09.020(17); however, to prevail at trial, it must prove that the offense qualifies as a "crime of sexual violence." RCW 71.09.020(18).

Coppin was wrongly decided and should not be followed by this court.

V. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016).

Appellate costs are "indisputably" discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Brian Taylor-Rose indigent at the end of the proceedings in superior court. Order of Indigency filed 8/28/15, Supp. CP. That status is unlikely to change, given his criminal history and his indefinite commitment. In fact, his history shows no job history at all. RP 703, 765. His indefinite civil commitment also bodes ill for his improved financial status. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

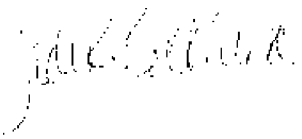
CONCLUSION

For the foregoing reasons, the court's order committing Brian Taylor-Rose must be reversed and the petition dismissed. In the alternative, the case must be remanded for a new trial with proper instructions.

If the state substantially prevails, the court should decline to impose appellate costs.

Respectfully submitted on September 29, 2016,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Brian Taylor-Rose
Special Commitment Center
P.O. Box 88600
Steilacoom, WA 98388

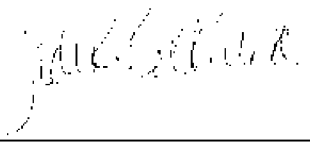
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Office of the Attorney General
farshad.talebi@atg.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 29, 2016.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

September 29, 2016 - 9:10 AM

Transmittal Letter

Document Uploaded: 3-479753-Appellant's Brief.pdf

Case Name: In re Brian Taylor-Rose
Court of Appeals Case Number: 47975-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

farshad.talebi@atg.wa.gov